In the Supreme Court of the United States

October Term 1973

Nos. 73-1377 and 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.,

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner

v.

CAMPAIGN CLEAN WATER, INC.,

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia and the Fourth Circuits

BRIEF OF THE CENTER FOR GOVERNMENTAL RESPONSIBILITY AS AMICUS CURIAE IN SUPPORT OF THE CITY OF NEW YORK

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Governmental Responsibility files this brief as amicus curiae under rule 42 (2) with the consent of both Respondents and Petitioner.

The Center is a privately funded non-partisan, non-profit organization housed at the University of Florida College of Law committed to the goal of promoting the accountability of government officials and institutions to the public. Its interest in this case emanates from its detailed study of the impoundment controversy and its effort to implement its scholarly conclusions. The year and one-half study was conducted by the Center's predecessor, the McIntosh Foundation Executive Impoundment Project,* whose summary findings have been reproduced at 119 CONG. REC. S21120 (daily ed. Nov. 27, 1973). The Center has continued the study of the impoundment issue to date. The study has produced, among other things, two law review articles: Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191 (1974); Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 618 (1974). Further, the Center has acted as amicus curiae on the issue in the instant case in three courts: *Minnesota v. Train*, No. 73-1446 (8th Cir., argued Feb. 13, 1974); *Texas v. Train*, No. 73-3965 (5th Cir., argued Apr. 29, 1974); and *Florida v. Train*, No. 73-156 (N.D. Fla. Feb. 25, 1974), *appeal argued*, Civil No. 73-3965, 5th Cir., Apr. 29, 1974. The Center's special interest is in the legal development and resolution of federal impoundment issues.

*This project is further described in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 22 (1973).

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STATEMENT OF THE FACTS

In 1972, Congress passed the most extensive program for cleaning the nation's waters in history. The Federal Water Pollution Control Act Amendments of 1972 [hereinafter cited as the "Water Pollution Control Act" or the "Act"] established as a national goal the achievement of clean waters in America by 1985. Congressional hearings on the proposed legislation were extensive. The bill passed the Senate by a vote of 74 to 0 and the House by 336 to 11.

On October 17, 1972, the President vetoed the bill because of what he termed "inflationary considerations." Congress considered the veto message and overwhelmingly overrode the veto. In the House, the vote was 247 to 23; in the Senate, 52 to 12.

Subsequently, on November 22, 1972, President Nixon ordered the Administrator of the Environmental Protection Agency not to allot the full amount provided in the final bill. Nixon ordered allotment of two billion dollars in fiscal year 1973 and three billion dollars in fiscal 1974. The amounts established in the bill were five billion dollars for fiscal 1973 and six billion dollars for fiscal 1974. The result was a cut-back of fifty-five percent of the funding provided by Congress.

SUMMARY OF ARGUMENT

The principal question posited by the instant case is whether the Administrator of the Environmental Protection Agency has discretion to refuse to allot the full amounts authorized by the Water Pollution Control Act. The statutory history and the overall structure of the statute demonstrate that the allotment provision is mandatory. There is no statement in legislative history stating that allotment is discretionary, while one of the principal sponsors of the bill directly stated that allotment is mandatory. Spending discretion exists, but at the obligation phase rather than at allotment. Additionally, the overall scheme of the statute demonstrates the desire of Congress to provide long range planning certainty to achieve total restoration of the nation's waters by 1985. This purpose is best accomplished through a mandatory allotment schedule coupled with some discretion in the obligation phase. There is a substantial negative impact on long range state planning when there is an exercise of discretion at allotment as distinguished from exercise of discretion at obligation. While the statute will operate well with mandatory allotment, insertion of discretionary allotment would cause illogical results. Refusal to allot in full will cause permanet loss of funds for obligation.

At whatever stage of the funding process, refusal to allot or expend fifty-five percent of the Water Pollution Control Act funds would be an abuse of discretion. Congress intended to provide funding for the solution of water pollution problems which would be available to the states. Fifty-five percent impoundment, substantially curtailing implementation of the program, is beyond the discretion of the Administrator. Further, justifications given as the basis for the refusal to allot were improper reasons outside the realm of relevant considerations; therefore, any exercise of discretion on this basis is improper.

Actions by the Administrator were not only outside his statutory authority but also beyond his constitutional authority. Neither the "faithfully execute" clause nor "inherent authority" support executive action in refusing to allot. Cases considering constitutional authority of the executive branch have consistently held it to be limited when impinging upon the intent of Congress, especially in the domestic area. Further, the refusal to allot after a veto of the Act had been overriden operated as an unconstitutional absolute veto.

Sovereign immunity is no bar to the suit against the Administrator; first, because of the well established exception of "officer suit" and, second, because the Administrative Procedure Act waives sovereign immunity. Similarly, political question is no bar to justiciability in the instant case since clear standards exist for judicial review and there is no absolute commitment to a coordinate branch of the absolute power to spend or not to spend.

In sum, there is no bar to judicial review of the action of the Administrator in refusing to allot. Further, these actions were in contravention of the explicit provisions and purposes of the Act and the Constitution.

ARGUMENT

I. THE PLAIN MEANING AND LEGISLATIVE HISTORY OF THE ALLOTMENT PROVISIONS OF THE WATER POLLUTION CONTROL ACT, TOGETHER WITH THE OVERALL STRUCTURE OF THE ACT, DEMONSTRATE THAT THE ADMINISTRATOR HAS NO DISCRETION TO REFUSE TO ALLOT.

The issue in the instant case is the meaning of the allotment phase of the Water Pollution Control Act — not the academic issue of the mandatory or permissive nature of appropriations generally.[1] The precise question before the Court is whether the allotment provision is mandatory and requires the Administrator to allot the full sums authorized by Congress. To determine whether an action within the funding process is mandatory, it is imperative to analyze not only that particular provision, but all relevant

[1] For discussion of the general issue, *see* Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 214 (1974). No generalization can be made about the mandatory nature of various phases of the spending process. There must however be reference to the particular budgetary provision with the other relevant provisions of the appropriations act. In fact, President Nixon, in vetoing an HEW-OEO appropriation, recognized the possible effect of statutory language:

> [N]early nine tenths of these increases are for mandatory programs which leave the executive branch no discretion whatever as to the level or the purpose of the added expenditures.

PUBLIC PAPERS OF THE PRESIDENT, *State of the Union Address*, Jan. 27, 1970, at 22.

portions of the funding process of that statute.[2] When the allotment phase is read as mandatory, the expenditure scheme of the Act is logical and internally consistent. Further, mandatory allotment best implements the goals of the Act. In contrast, if the allotment provision is read as discretionary, the funding procedure becomes speculative and the Act is effectively crippled.

This is not to say the Administrator has no discretion in the implementation of the Act. In fact, discretion is apparently accorded at the obligation phase. However, the plain meaning and the history of the relevant provisions show that the allotment phase is mandatory.

A. THE HISTORY AND PLAIN MEANING OF THE AUTHORIZATION AND ALLOTMENT PROVISIONS (SECTION 205 AND SECTION 207) SHOW THAT ALLOTMENT IS MANDATORY.

The sums authorized to be appropriated must be fully allotted as specified by Congress in sections 205 and 207:

> §205--Sums authorized to be appropriated pursuant to section 207...shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized....
>
> §207--There is authorized to be appropriated to carry out this title...for the fiscal year ending June 30, 1973,

[2] In the instant case, it should be noted that the Act reverses the normal budgetary procedure whereby sums are appropriated by Congress and later obligated and expended by an executive agency (see Appendix). In the Act, funds are first authorized under section 205 to be appropriated later to carry out the purposes of the Act. The Administrator is then required under section 205 to *allot* the authorized contract authority among the states. Once allotted, the sums become available to the states for *obligation*. The Administrator then reviews grant applications submitted by states and municipalities to determine if they satisfy statutory and regulatory criteria. If approved, a contractual obligation arises and, upon project completion, an appropriation liquidates the obligation.

not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

1. THE PLAIN MEANING OF THE ALLOTMENT PROVISION REQUIRES ALLOTMENT OF THE FULL SUMS LISTED IN SECTION 207.

Initially, it should be recognized that "shall allot" is an intrinsically mandatory phrase. *See Boyden v. Comm'r of Patents*, 441 F.2d 1041, 1043 & n.3 (D.C. Cir.), *cert. denied*, 404 U.S. 842 (1971); *Stanfield v. Swensor*, 381 F.2d 755, 757 (8th Cir. 1967). It is therefore mandatory that, under section 205 (a), the Administrator allot sums authorized to be appropriated in section 207. The sums authorized to be appropriated in section 207 are five and six billion dollars. No other sums are mentioned. The plain meaning of the language, therefore, is that the Administrator must allot the amount authorized to be appropriated.

Since sections 205 and 207 are plainly expressive of a mandatory allotment, resort to legislative history is unnecessary. Interpretation of the funding provisions of the Act should remain within its four corners, giving due weight to the plain meaning, internal logic and goals of the Act's provisions. Use of extrinsic evidence must be predicated upon a finding that a statute is ambiguous or that its plain meaning leads to absurd or futile results. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). The fact that the Administrator *claims* that there is an ambiguity is not conclusive. The Administrator offers legislative history in support of its assertion that the construction of the statute is doubtful. Extrinsic evidence, however, must be used "to *solve*, but not to *create* an ambiguity."

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932); *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899). When considered by itself, the Act is clear in declaring that the Administrator *shall allot* the amounts specified.

It must also be recognized that the "not to exceed" language in section 207 does not modify the clear meaning of "shall allot" as has been argued by the Administrator. *See* Brief for Petitioner at 15. The Administrator argues that "not to exceed" shows that the sums mentioned are only ceilings which reflect an intent to allow obligation of lesser amounts. However, section 205 is designed to mandate allotment and to specify the date for allotment while section 207, where the phrase "not to exceed" appears, is designed to specify the year of availability and the maximum sums authorized to be appropriated. Perhaps there might be warrant for imposing "not to exceed" on section 205 if there were no other explanation for its existence in the Act, *cf. Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819), but there is another explanation.

The phrase operates as a limit on appropriations (a limit on the Congress)[3] and a ceiling on the authority of the Administrator to obligate funds. The phrase means "no more than." Further, "not to exceed" paces expenditure. Section 207 utilizes "not to exceed" three different times as a ceiling on amounts which may be spent in each year so as to pace expenditure of the total of 18 billion dollars. If in fact Congress were actually attempting to utilize "not to exceed" to be expressive of discretionary allotment it could

[3]In a discussion of an act with an "authorization to appropriation" mechanism similar to that in the instant case, a district court stated that authorization provisions appeared to be a limitation on Congress, rather than on the Administrator, to prevent appropriation of more funds than those authorized for a given program. Guadamuz v. Ash, 368 F. Supp. 1233, 1239-40 (D.D.C. 1973).

have done so explicitly. The clause could have read "authorized to be allotted and appropriated not to exceed...."[4]

When considered in and of itself, the Act is clear in declaring that the Administrator shall allot the amounts specified. There is no need to resort to legislative history although that history also supports the mandatory nature of allotment.

2. THE LEGISLATIVE HISTORY OF SECTIONS 205 AND 207 SUPPORTS THE CONCLUSION THAT WHILE THERE IS DISCRETION WITHIN THE ACT TO CONTROL OBLIGATIONS, THERE IS NO DISCRETION AT THE ALLOTMENT PHASE.

The focus of the statutory controversy in the instant case is the interpretation of the inclusion or omission of three words and phrases within sections 205 and 207 during the enactment of the Water Pollution Control Act:

(1) deletion of "all" in section 205 (a) by the conference committee:

> [All] sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator....

(2) addition of "not to exceed" before the sums specified in section 207:

> There is authorized to be appropriated to carry out this title, other than §§208 and 209, for the fiscal year ending June 30, 1973, [not to exceed] $5,000,000,000,

[4] "The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Iselin v. United States, 270 U.S. 245, 250-51 (1925).

for the fiscal year ending June 30, 1973, [not to exceed] $6,000,000,000 . . . . . .

(3) the words "shall be allotted" in section 205.

The deletion of "all" in conference is asserted to be an indication that Congress intended to allow discretion in the allotment phase. However, nowhere in the conference report or any legislative history is there a direct statement to that effect. The Administrator relies strongly on a statement by Representative Harsha:

> I want to point out that the elimination of the word "all" before the word "sums" in section 205 (a) and insertion of the phrase "not to exceed" in section 207 was intended . . . to emphasize the President's flexibility to control the *rate of spending*.

118 CONG. REC. H9122 (daily ed. Oct. 4, 1972) (emphasis added). The key to understanding the statement, however, comes when Representative Harsha further explicates:

> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item* in the expenditures [*sic*] of funds.

Id. (emphasis added).

The screening procedure and project approval which Representative Harsha has identified as the pacing item to control the rate of expenditures is the obligation phase. Representative Harsha clearly specifies that it is *this* phase (obligation) of the funding process where he finds the discretion to control the *rate* of spending. Moreover, Congressman Harsha continues: "It is clearly the understanding of the managers that under these circumstances [the application

review procedure] the Executive can control the *rate of expenditures*." *Id.* (emphasis added). The comments of Representative Harsha make clear that the statement primarily cited as making allotment discretionary actually refers to "obligation." Nowhere in these comments is there reference to "flexibility" in allotment or to allotment as a "pacing item." Further, because of the different phases in the Act, control over allotment does not so much affect the *rate* of spending as it does the *amount* of spending,[5] further indicating that the reference to discretion relates to obligation.

A colloquy between former Representative Ford and Representative Harsha further supports the interpretation that discretion was granted only at the obligation phase:

> As I understand the comments of [Representative Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*

Id. at H9123 (emphasis added). Representative Harsha responded:

> I do not see how reasonable minds could come to any other conclusion than that the language means *we can obligate or expend up to that sum -- anything up to that sum but not to exceed that amount.*

Id. (emphasis added).

[5] Allotment relates only to the amount a state may obligate. Obligation may occur at various times during the year after administrative review of applications, thereby pacing the rate of expenditure. *See* p.28,29,32 *infra.*

It is clear that, if what Representative Harsha says is accurate, namely that anything up to the maximum sum can be obligated or expended, then discretion at the allotment phase is virtually impossible. That is, if the Administrator exercises *any* discretionary reduction at the allotment phase, then what Representative Harsha proclaims as possible becomes impossible.[6]

The legislative history is totally devoid of any statement that discretion exists at the allotment phase to withhold funds. In fact, as explained above, the statements advanced by the Administrator as indicating a discretionary allotment do not even refer to the allotment phase. Instead, the legislative history is replete with direct statements referring to discretion at the obligation phase. This pattern of legislative history, tending to place discretion at obligation rather than allotment, is further strengthened by a categorical statement in the legislative history by a principal sponsor of the bill which directly applied to sections 205 and 207 and explains their effect:

> Under the amendments proposed by Congressman William Harsha and others, the authorizations for *obligational authority* are "*not to exceed*" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though *they must be allocated*.[7] These two provisions were submitted to give the administration some flexibility concerning the *obligation* of construction grant funds.

[6] Allotment necessarily precedes obligation. If allotment is discretionary, then the Administrator *cannot* possibly obligate up to the maximum sum, unless he exercises his discretion to allot the full amount. If allotment is mandatory, then Congressman Harsha's statement is correct and the Administrator can obligate up to the full amount. There is ample history supportive of making full amounts available for obligation. *See* footnote 15, and accompanying text *infra*.

[7] The Senate bill had used the term "allocate" rather than allotment. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 113 (1972). *See* New York v. Train, 494 F.2d 1033, 1043 n.19 (D.C. Cir. 1974).

118 CONG. REC. S18546 (daily ed. Oct. 17, 1972) (remarks of Senator Muskie) (emphasis added). This statement by Senator Muskie, Senate sponsor of the Act, in no way conflicts with the statements of Representatives Harsha and Ford. The statement does, however, provide a critical clarification. Rather that merely alluding to where discretion is vested, Senator Muskie clearly states when discretion is *not* vested.

The deletion of the word "all" from section 205 has been given undue weight. The provision has essentially the same meaning with or without "all." Moreover, this Court has stated that statutes must be interpreted on "the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). The act of deleting the word "all" should be accorded no particular significance if the meaning of the provision is not affected by the omission. "All sums" is equal to "sums" albeit less emphatic.[8]

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[8]It is a general principle of English grammar that when there is the absence of a qualifying adjective, the noun is considered a totality. *See* P. ROBERTS, MODERN GRAMMAR 29 (1968). An illustration of the significance that Congress apparently gives to the term "all" is found in the legislative history of the old Senate Bill. Section 205 of that bill read, "*all allocations* to the states under Section 205 are to be made on the basis of population" (emphasis added). The commentary by the committee explaining this section reads as follows: "This section provides that *sums appropriated* or authorized to be obligated for the construction of treatment works under Title II, will be allocated among the states on the basis of population alone" (emphasis added). Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1448 (1973). The significance of this passage is the absence of "all" before "sums" in the commentary, indicating a tendency in Congress not to use an adjective in this context, and probably for no particular reason -- whether that adjective be "some," "all" or "the."

Despite the legislative history cited above, a district court, in dicta, has concluded that the allotment phase was discretionary. *Brown v. Ruckelshaus*, 364 F. Supp. 258, 268 (C.D. Cal. 1973). But to reach this conclusion the court examined legislative history referring only to discretion at the obligation phase--a proposition not even at issue. While legislative history supports the Administrator's position in *Brown* that not every penny must be spent in any given year, the history does not support the conclusion that allotment is discretionary.

Another district court found discretion based on the act of deletion--what the court termed "syntactical history." *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 698-99 (E.D. Va.), remanded with directions *sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973). In the presence of what the court felt to be an unclear legislative history subjecting the Act to two interpretations, this "syntactical history" was found to be persuasive. However, no substantiation was offered as to what the "syntactical history" of the deletion was, only ex post facto commentary. If legislative history is unclear, "syntactical history" is nonexistent. Nevertheless, Judge Merhige declares this deletion to be the principal source for concluding that Congress intended the Administrator to exercise some discretion with respect to allotments. The weight of opinion is, however, in disagreement with Judge Merhige's conclusion.[9] The mere removal of a word is subject to many interpretations and is of itself not sufficient to support a major deviation from the plain meaning and legislative history of a statute.

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[9]New York v. Train, 494 F.2d 1033 (D.C. Cir. 1974); Texas v. Fri, No. A-73-CA-38 (W.D. Tex., Oct. 2, 1973); Martin-Trigona v. Ruckelshaus, No. 72-3044 (N.D. Ill., June 29, 1973); Minnesota v. USEPA, No. 4-73 Civ. 133 (D. Minn., June 25, 1973), *appeal argued*, Civ. No. 73-1446, 8th Cir., Feb. 13, 1974. *But see* Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973) (dicta).

In sum, a combination of circumstances indicates the mandatory nature of allotment. First, no legislator directly refers to allotments as discretionary. Those who supported discretion in allotment, if there were any, did *not* express their opinion;[10] and were unable to pass any language explicitly discretionary. Third, one of the principal sponsors, Senator Muskie made a direct statement that the deletion of "all" did not affect the mandatory allotment provision. Fourth, the plain meaning and statutory history support mandatory allotment and discretionary obligation. The total impact of these circumstances clearly shows allotment to be mandatory. Both the legislative history, which clearly supports the mandatory nature of allotment, and the plain meaning of the words of the allotment provision admit of no reasonable interpretation other than a mandatory allotment provision.

3. STATEMENTS IN LEGISLATIVE HISTORY REFERRING TO AUTHORITY TO "IMPOUND" CONFER NO AUTHORITY TO REDUCE ALLOTMENTS.

The Administrator contends that certain excerpts from the legislative history indicate that the power to impound authorized funds was conferrred upon the Executive. Brief for Petitioner at 14 *et seq.* The contention is unsupported, first because these cited statements refer to discretion only at the post-allotment phase (obligation) and, second, because any reference to Office of Management and Budget's authority to impound is inapplicable in the instant case.

The Administrator contends that the quoted language confers a general power to impound independent of the Act. Brief for Petitioner at 10, 44. The primary thrust of this argument depends upon Representative Harsha's statement

[10] "The silence of sponsors of amendments is pregnant with significance." NLRB v. Fruit & Veg. Packers, Local 760, 377 U.S. 58, 66 (1964).

comparing impoundment under the Highway Trust Fund with impoundment under the Act. Brief for Petitioner at 17. Congressman Harsha stated:

> Surely, if the administration can impound monies from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.

118 CONG. REC. H9122 (daily ed. Oct. 4, 1972). Although the statement indicates a conferring of control over spending power, the only power exercised by the Executive in the Highway Trust Fund to which Representative Harsha refers occurs at the obligation phase with "contract controls." *See State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1103-04 (8th Cir. 1973). In fact, the Executive and the Eighth Circuit have recognized that the Highway Trust Fund's "allotment" process is ministerial. *See* p. 29-30 *infra*.

The Administrator also infers a general power to impound from other statements referring to the Office of Management and Budget.[11] Even if the OMB has adequate impoundment power under the Anti-Deficiency Act, the OMB has failed to utilize any option which might exist. In OMB's report of February 19, 1974, pursuant to the Federal Impoundment and Information Act, 31 U.S.C.A. §581c-1 (Supp. 1974), it omitted the withheld allotments from its list of impoundments. 39 Fed. Reg. 7707, 7708 (1974). Since none of the present withholding was accomplished through

[11] Senator Nelson stated:

> Only if the President's Office of Management and Budget or the Congress specifically directed otherwise would the money not be available at the levels in the legislation, according to my understanding.

118 CONG. REC. S16888 (daily ed. Oct. 4, 1972).

any OMB authority, the Administrator may not rely upon powers vested in the President through the OMB. Consequently, any references to OMB "impoundment" are inapplicable since that power, whether or not it exists, has not been exercised.

Further, even if the OMB had utilized its power to reserve under the Anti-Deficiency Act, 31 U.S.C. §665 (c) (1970), that action would have exceeded their authority. Reserves cannot contravene the intent of the Congress. In a report to the Senate Appropriations Committee recommending reserves, the Bureau of the Budget and the Comptroller General stated that there was a need "for machinery to conserve appropriations which are in excess of *actual requirements*."[12] This emphasizes that the purpose was not to allow the reserving of required funds.

In another report, prepared by the House Appropriations Committee to accompany the 1950 amendments to the Anti-Deficiency Act, the following discussion stemmed from consideration of President Truman's impoundment of Air Force funds:[13]

> It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds.

Even more persuasive is the Bureau of the Budget Examiner's Handbook written in 1952, shortly after the 1950 amendments to the Anti-Deficiency Act, which stated:

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[12]Quoted in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 107 (1973) (emphasis added).

[13]H.R. REP. NO. 1797, 81st Cong., 2d Sess. 311 (1951).

"Reserves must not be used to nullify the intent of Congress with respect to specific projects or level of programs."[14] The decision of the Eighth Circuit in *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1118 (1973), reaffirmed these interpretations and considered the Anti-Deficiency Act as no justification for "violating the purposes and objectives of the particular appropriation statute."

A withholding of the magnitude accomplished by the Administrator in the instant case, if done by reserving, would be an encroachment on congressional intent and would be outside the purview of the Anti-Deficiency Act. However, as previously stated, this question is not directly before the Court since the refusal to allot was by the Administrator and not the OMB. Consequently, all references to legislative history which are argued as granting impoundment authority regarding allotment either refer to another phase of the Act (obligation) or to unexercised OMB reserve authority.

B. EXPRESS GOALS AND OVERALL FUNDING STRUCTURE OF THE ACT DEMONSTRATE THAT ALLOTMENT OF AUTHORIZED SUMS IS MANDATORY.

> [The Act] has received more thorough consideration and has engendered more productive discussion than any other in which I have participated during my service in the Senate.

118 CONG. REC. S16881 (daily ed. Oct. 4, 1972) (remarks of Senator Cooper). Since a determination of the manditoriness of

[14] U. S. BUREAU OF THE BUDGET, EXAMINER'S HANDBOOK (1952) (quoted by J. Williams, *The Impounding of Funds by the Bureau of the Budget* (1955) cited in *Joint Hearings on S.373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 844, 859 (1973)).

allotment affects the entire Act, it is necessary to examine allotment in the context of the other relevant provisions of the Act. The Act, as Senator Cooper points out above, was carefully constructed. However, if allotment is considered discretionary, this well-planned Act reaches illogical results. Congressional enactments "should never be construed as establishing statutory schemes which are illogical, unjust or capricious." *Lee Fook Chuey v. Immigration & Naturalization Serv.*, 439 F.2d 244, 249 (9th Cir. 1970).

The logic and goals of the entire Act are essential in interpreting the allotment provision. As the Court observed in *Richards v. United States*, 369 U. S. 1, 11 (1962):

> We believe it fundamental that a section of a statue should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." (footnotes omitted).

Statutory construction and the legislative history of the Act cannot exist independently or in a vacuum.

> We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment.

Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 353 (5th Cir. 1968).

The Eighth Circuit reaffirmed this principle in *State Highway Comm'n v. Volpe*, citing *Richards* and Lord Campbell's statement of over a century ago that:

> [i]t is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the *whole scope* of the statute to be construed.

Liverpool Borough Bank v. Turner, 45 Eng. Repr. 715, 718

(1860), *aff'd* 70 Eng. Repr. 703, as quoted in 479 F.2d 1099, 1112 (8th Cir. 1973) (the court's emphasis).

Thus, an examination of the goals of the Act as well as its other provisions and internal logic is necessary in construing the allotment provision.

1. GOALS OF THE ACT EXPRESS A NATIONAL COMMITMENT OF FUNDS TO RESTORE THE WATERS OF THE UNITED STATES.

> Sec. 101 (a). The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective, it is hereby declared that, consistent with the provisions of this Act -- (1) It is the national goal that the discharge of pollutants . . . be eliminated by 1985. . . .
>
> . . . . .
>
> Sec. 201 (a). It is the purpose of this title to *require* and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this Act. (emphasis added).

In the debate prior to the override of the Veto, Senator Muskie stressed that "[t]he whole intent of this bill is to make a national commitment" of funds to solve our problems in water pollution. 118 CONG. REC. S18547 (daily ed. Oct. 17, 1972). Congressman Harsha in the House debate on the Conference Report noted that "[t]he objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters." 118 CONG. REC. H9117 (daily ed. Oct. 4, 1972). In his 1970 State of the Union message, President Nixon recognized the immediate necessity of the national commitment "to put modern municipal waste treatment plants in every place in America where they are needed to make our waters clean again . . . ." 116 CONG. REC. 740 (1970). Although the Act is not the program proposed by the President, the goals of his program were the same as those of the Act, except for the

amount and methods of funding. In his veto message, the President stressed, "My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that *same intent* . . . ." 118 CONG. REC. S18534 (daily ed. Oct. 17, 1972) (emphasis added).

Congress overrode that veto to implement the well-recognized and undisputed goals of the Act. Moreover, if the Administrator's action is upheld in the instant case, the effect would be to legitimize, or constructively "legislate," the funding levels suggested by the President in his bill. These lower levels were explicitly rejected by Congress upon its adoption of the Act and its subsequent override of the President's veto. It was clear that Congress wanted to compel the higher level of funding.[15]

There were other indications that Congress wanted to make the full amount available to the states. Early in the consideration of the Act, congressional proponents advocated avoiding the normal method of funding which requires approval by the appropriations committees.[16] The argument advanced was that funding levels had been continually reduced by the

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[15]" [T]he confereees are convinced that the *level of investment that is authorized is the minimum* dose of medicine that will solve the problems we face." 118 CONG. REC. S16871 (daily ed. October 4, 1972) (remarks of Senator Muskie) (emphasis added). "Contract authority is provided for up to $5 billion in 1973, $6 billion in 1974, and $7 billion in 1975. *This will be allocated to the States on the basis of the Environmental Protection Agency's annual assessment of needs established without regard to budgetary limitations and other nonwater quality factors.*" *Id.* at S16881 (remarks of Senator Cooper) (emphasis added). "The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation, and specifically studying how much money would be necessary to achieve the objective and goals of the act, as set forth in section 101 (a) . . . ." 118 CONG. REC. S18548 (daily ed. October 17, 1972) (remarks of Senator Muskie).

[16]See n.2 *supra*, and p. 23-24 *infra*.

appropriations committees below the authorized level -- a common occurrence.[17] Thus, contract authority was utilized to insure that full amounts authorized would be made available for obligation,[18] a purpose which would be frustrated by permissive allotments.

Provisions of a statute should not be interpreted to frustrate the goals of Congress regarding funding levels. As expressed by the lower court in the instant case:

> We find that it was Congress' intention that the full $18 billion be spent to control water pollution .... [T]he legislative history . . .manifests an intent to create a procedure which would insure that the total authorized funds would be made available to states. It is this goal which must guide us in interpreting the funding mechanism, for if discretion in allotment would make the achievement of this goal more difficult, it must be assumed that Congress intended no such authorization.

New York v. Train, 494 F.2d 1033, 1042 (D.C. Cir. 1974). The Act clearly contemplates full expenditure of funds to implement the goal of cleaning the nation's waters.[19]

[17] Under normal budgetary procedures, appropriations are often made at a level lower than authorizations. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE GAP BETWEEN FEDERAL AID AUTHORIZATIONS AND APPROPRIATIONS, FISCAL YEARS 1966-1970 (1970).

[18] "[L]et us put up the Federal share in a way, with language and an understanding, that makes it clear we are not backing off." 117 CONG. REC. S17446 (daily ed. Nov. 2, 1971) (remarks of Senator Muskie).

[19] If the Administrator's argument were to be accepted, he could conceivably "control" allotment to $0; it is worth considering the fate of this program at the Administrator's present rate of allotment. Senator Muskie estimated that even with full allotment, it would take seven years to expend the $18 billion. 118 CONG. REC. S18547 (daily ed. Oct. 17, 1972). At the Administrator's present 45% rate of allotment, the optimum time for expenditure of the full $18 billion is approximately 15 years.

2. PERMISSIVE OR MULTIPLE ALLOTMENTS WOULD FRUSTRATE THE INTENT OF THE ACT TO ENCOURAGE LONG RANGE PLANNING.

The Administrator asserts authority to allot funds for any given year at any time and that "there is no practical difference in result between exercising such control at the allotment or at the obligation stage." Brief for Petitioner at 23. Neither the contention for multiple allotments nor the assertion that there is no practical difference is supportable.

Nowhere in the Act is there provision for multiple allotments or disposition of funds authorized but not allotted. On the other hand, section 205 (b) (1) of the Act deals extensively with the reallotment of funds allotted but not obligated. The inference is that incomplete obligation was anticipated by Congress, but incomplete allotment was not.

The Administrator has adopted the position that funds not allotted will be available for obligation indefinitely. Brief for Petitioner at 25 *et seq.* However, there is no support for such a contention in the Act, and the idea that the Administrator may absolutely control release of unallotted funds forever by multiple allotments is plainly unreasonable.

One of the primary problems with the Federal Water Pollution Control Act of 1956 was that its yearly appropriation scheme caused uncertainty because of its failure to give notice to the states of future federal commitments. The appropriation method was deemed neither practical nor economical. 117 CONG. REC. S17445-52 (daily ed. Nov. 2, 1971).

Contract authority,[20] the new method incorporated in section 203 of the Water Pollution Control Act Amendments of 1972, was designed to allow flexibility in the planning stage and give long range assurances to the states and local agencies that the funds were available in the amount specified by Congress. Representative Harsha stressed that:

> It is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants . . . .

118 CONG. REC. H2727 (daily ed. March 29, 1972); *see* 117 CONG. REC. S17451 (daily ed. Nov. 2, 1971) (remarks of Senator Muskie). The District of Columbia Circuit Court stated simply, "[t]he Act was passed to insure that ultimate grantees could rely in advance on the amounts available." *New York v. Train*, 494 F.2d at 1036-37. In *Texas v. Fri*, No. A-73-CA-38, Slip Op. at 5 (W.D. Tex., Oct. 2, 1973), the district court saw the same issue to be one of logic:

> The feeling was that without unequivocal federal financial commitment state and local governments would have difficulty entering into long term contracts and financing long term bonds. *It is illogical* to think that Congress would inject the same uncertainty back into the system it had sought to avoid with the allotment procedure by giving the Administrator discretion to choose the amount to be made available to the state and local governments. (emphasis added).

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[20] With a "contract authority" method of funding, Congress authorizes an amount to be committed by the Administrator according to conditions and limitations specified by law. The actual appropriation of funds by Congress is *pro forma* and takes place after obligation of funds by the Administrator. *See* 117 CONG. REC. S17445-52 (daily ed. Nov. 2, 1971); U. S. OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-34, INSTRUCTIONS ON BUDGET EXECUTION §21.1, at 6 (1971).

Exercise of discretion at the allotment phase clearly precludes effective long range planning by states and localities -- a primary goal of the Act. Exercise at the obligation phase would not hinder planning but would control the rate of expenditure to qualified applicants. Consequently, the Administrator's contention that there is no practical difference in exercise of discretion at obligation or allotment is fallacious. Exercise of discretion through multiple allotment frustrates one of the primary goals of the Act -- long range planning by states.

Moreover, the Administrator argues for discretion at both the allotment and obligation phases. Brief for Petitioner at 23. This would result in almost total uncertainty about the level of funding, and render long range planning impossible.

3. THE INTERNAL LOGIC OF THE ACT READ WITH THE REALLOTMENT PROVISION, SECTION 205 (b), INDICATES ALLOTMENT TO BE MANDATORY.

Under section 205 (b), budget authority allotted but unobligated after an initial thirty-month period is redistributed by reallotments to the states and continues to be available for obligation. Reallotment of unobligated funds thus permits a constant level of funding to continue to be available to the states in order to facilitate the accomplishment of the goals of the Act. If unallotted, however, the funds are never available for reallotment or obligation and therefore are permanently lost to the states.[21] *See New York v. Train*, 494 F.2d at 1049.

[21] The Act requires the Administrator to make allotments by a fixed date under section 205 (a). Once properly allotted, section 205 (b) (1) requires:

> Any sums allotted to a State . . . shall be available for obligation . . . in such State for a period of one year after the close of the fiscal year for which such sums are authorized.

Thus, since subsection (b) (1) is the exclusive provision for obligational availability and since it specifies a definite obligational period, *see* 31 U.S.C. §701 (b), any amounts unallotted by the statutory date are never available for obligation and consequently lapse. *See* 31 U.S.C. §701 (a) (2). Further, these same unallotted sums can not be reallotted since only those amounts allotted by the statutory date may be reallotted under section 205 (b) (1).

The reallotment procedure, read together with a mandatory allotment provision, supports the policy of the Act to encourage planning. It is well established that separate provisions of a single act should be interpreted so as to reach the " 'most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Finding allotment permissive would clearly frustrate the overall purpose of the Act.

4. SECTION 206 (f) (1), WHICH PROVIDES FOR ADVANCE OBLIGATION OF FUNDS AUTHORIZED FOR FUTURE ALLOTMENTS, IS MEANINGLESS UNLESS ALLOTMENT IS MANDATORY.

Section 206 (f) (1) allows the Administrator to obligate funds in advance for a state's particular project, even if the funds allotted for that fiscal year have been fully obligated. This is possible only if the authorization for the subsequent fiscal year will ensure payment of the obligation incurred. If a state may not be sure of the level of future allotments, as would be the situation with permissive allotment, this provision is meaningless.

The proposition is well established that a statute must be construed, if at all possible, to give effect to all its provisions. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). As the D.C. Circuit has observed:

> Section 206 (f) (1) would have scant operative effect if the "state's expected allotment" could not be known because the Administrator had discretion to allot only a portion of such authorization. This is further evidence of a legislative purpose to make allotment mandatory.

New York v. Train, 494 F.2d at 1049-50.

Mandatory allotment allows the Administrator to use his discretion as to individual projects and to exercise control over the obligation and rate of expenditure of funds without jeopardizing the level of funding available. The reallotment provision was provided by Congress to allow the Administrator to use discretion at the *obligation phase* without raising the danger that states would have insufficient time to obligate deferred projects. *Cf. State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114-15 (1973).

The Administrator argues that funds currently unallotted will not be lost to the states because section 205 is not a once-a-year action. Section 205 states:

> *the* allotment for fiscal year 1973 shall be made not later than .... (emphasis added).

This provision obviously contemplates only an annual allotment. A system allowing more than one allotment would wreak havoc with state planning. States must plan to accomplish the maximum within the amounts allotted. The January allotment for a fiscal year and the carryover to the next fiscal year gives the states time to plan how best to attain their goals. These proposed mid-way allotments do not give the states adequate notice or time to plan the efficient use of funds. In many cases, it would be impossible for a state to expand a program after it is started. Plans or specifications would have to be redrawn, and the program would have to be resubmitted to the Administrator. If approved, bids would have to be relet. This system is not only inefficient but clearly contrary to the intent of Congress.

The District of Columbia Circuit Court reached the same conclusion and observed, "the Act nowhere mentions any type of later augmentation procedure" for additional allotments. *New York v. Train*, 494 F.2d at 1049. Therefore, the loss of funds resulting from the reallotment procedure when allotment is read to be permissive cannot be cured by secondary allotments not permitted by the Act.

5. THE OBLIGATION PROVISION AS WRITTEN INDICATES THAT THE OBLIGATIONAL PHASE RATHER THAN THE ALLOTMENT PHASE IS DISCRETIONARY.

Section 203 sets the general scheme for contract authority and requires applicants to submit plans and specifications after allotment. Approval is based upon satisfying the grant conditions specified in section 204. Only if discretion is present at the obligation phase rather than at the allotment phase can the Administrator intelligently exercise his discretion.

At this point, after allotment and the submission of plans, the Administrator has at his disposal the information necessary to evaluate specific projects and the needs of states -- information not available at the allotment phase. Therefore, the Administrator can better decide upon reductions or delays which least damage the goals of the Act.

Discretionary allotment would hamper effective operation of the obligation phase by precluding the exercise of informed discretion. If a statute is susceptible to either of two opposed interpretations (in the instant case either mandatory or discretionary allotments), the statute must be read "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U.S.1, 31 (1948). Consequently, the allotment provision should be read as mandatory to promote the purpose of advance planning and informed exercise of discretion.

C. ALLOTMENT IS A BUDGETARY MECHANISM WHICH IS BOTH GENERALLY MANDATORY AND SPECIFICALLY MANDATORY IN THE CONTEXT OF THE ACT.

Petitioner's argument that allotment is discretionary fails to take cognizance of the characteristics of allotment as a budgetary tool. Allotment in the Act is a technical process in the implementation of contract authority. The amount each state

is allotted is determined by the "ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States." Section 205 of Pub. L. No. 92-500, 86 Stat. 816. *See also* Shinn, *The Federal Grant Program to Aid Construction of Municipal Sewage Treatment Plants: A Survey of the 1972 FWPCA Amendments*, 48 TUL. L. REV. 85, 88 (1973). The Administrator then determines, through the obligation phase, the extent of the actual needs of the states. Allotment provides a ceiling within which the Administrator may exercise informed discretion by evaluating proposals from the states.

Allotment has been found ministerial in other spending enactments. In *Udall v. Wisconsin*, an action involving allocation of wildlife restoration funds to states, the court found the Secretary of the Interior was "given no discretion in the initial apportionment." 306 F.2d 790, 793 (D.C. Cir. 1962), *cert. denied*, 371 U. S. 969 (1963). Apportionment in *Udall* is the same as allotment in the instant case. The *Udall* court also recognized that there was discretion later in the funding process: "approval or disapproval of a conservation project submitted by a state . . .involves an administrative judgement . . . ." 306 F.2d at 793 n.15. The same discretionary role is played by obligation in the instant case.

Also indicative of the nature of allotment in the instant case is the practice of "apportionment" in the Federal-Aid Highway Act, 23 U.S.C. §§ 101 *et seq.* (1970). The Conference Report accompanying the Water Pollution Control Act specifically refers questions on the interpretation of the mechanics of contract authority funding to the Federal-Aid Highway Act. H.R. REP. NO. 1465, 92d Cong., 2d Sess. 111 (1972). Further, the Administrator, in his brief, recognized congressional

references to the procedures of the Highway Act. Within the meaning of the Highway Act, apportionment is a ministerial function -- the Secretary of Transportation has no discretion. "Apportionment" by the Secretary among the states according to a set formula is exactly the same as allotment. As the Eighth Circuit Court of Appeals observed:

> [T]he Secretary is required to apportion among the several states certain sums authorized to be appropriated for expenditure.

State Highway Comm'n v. Volpe, 479 F.2d 1099, 1107 (8th Cir. 1973). As authority for the above statement, the Eighth Circuit cited former Federal Highway Administrator F. C. Turner, who observed that:

> There is absolutely no discretion of any kind in our office with respect to how much any State gets in any of these categories of funds [pursuant to the formula]. The apportionment is specified in the law and we distribute it right to the dollar.

Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 80 (1971), as quoted in *State Highway Comm'n v. Volpe*, 479 F.2d at 1107 n.8. The District of Columbia Circuit Court directly concurred in the conclusion of the *Volpe* court that "allotment" under the Highway Act is mandatory.

> "[I]mpoundment" under the Federal-Aid Highways Act is achieved only by the limiting of contracts awarded (*i.e.* obligation). There is *no possibility under that Act to reduce at the "allotment" stage.*

New York v. Train, 494 F.2d at 1046-47 (emphasis added). The conferees' reference to the mechanics of the Highway Act is strong indication that they expected allotment to be mandatory.

At least four federal district courts and the District of Columbia Circuit Court of Appeals have held that allotment in the Water Pollution Control Act is a non-discretionary, administrative procedure.[22]

[22] In the lower federal court which tried the instant case, the district court held:

> [t]he language of the pertinent sections of the Act, read in the light of their legislative history, clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums authorized to be appropriated by §207.

358 F. Supp. at 679 (D. D.C. 1973). This opinion was affirmed by the District of Columbia Circuit:

> [B]elieving as we do that there is a clear distinction under the Act between allotment and obligation and that there can be *no discretion* as to the former, we find it unnecessary to consider whether an allotment could be "augmented" in a later fiscal year; full allotment must be made in each fiscal year.

New York v. Train, 494 F.2d at 1049. In *Texas v. Fri*, the district court found:

> in light of the high priority placed by Congress on the Act, the language of the Act, and the legislative history of the Act, this Court concludes that the Administrator has a mandatory duty to allot to the Plaintiffs the sums authorized by Congress in §207 of the Act in accordance with §205 (a).

No. A-73-CA-38, Slip Op. at 5-6 (W.D. Tex., Oct. 2, 1973), *appeal argued*, No. 73-3965, 5th Cir., April 29, 1974. In *Minnesota v. USEPA*, it was held:

> In failing to allot all of the money authorized in this matter, the Administrator is acting in express violation of the purposes of the Act itself as well as in violation of the purposes of the Act as set forth by Congress.

No. 4-73 Civ. 133, Slip Op. at 13-14 (D. Minn., June 25, 1973), *appeal argued*, Civil No. 73-1446, 8th Cir., Feb. 13, 1974. Also, in *Florida v. Train*, the district court stated:

> In view of the legislative history behind the Act and the goals sought to be achieved by the Act it is illogical to believe that Congress accorded the Administrator discretion at the allotment stage.

No. 73-156, Slip Op. at 6 (N.D. Fla., Feb. 25, 1974), *appeal argued*, Civil No. 73-3965, 5th Cir., Apr. 29, 1974.

As these cases have recognized, the function of allotment is merely to parcel out the authorization and is not tantamount to expenditure by the Federal Government. The general utilization of allotment as a ministerial procedure to divide funds among the states rebuts the Administrator's contention that allotment is discretionary.

D. EVEN IF DISCRETION IS FOUND, THE ADMINISTRATOR'S ACTION IN WITHHOLDING FIFTY-FIVE PERCENT OF AUTHORIZED FUNDS WAS AN ABUSE OF DISCRETION IN LIGHT OF THE EXPRESSED GOALS OF THE ACT.

The district court in *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973), determined that the allotment phase of the Act confers discretion on the Administrator. On appeal to the Fourth Circuit, neither party sought review of the district court's finding of discretionary allotment. In fact, the Fourth Circuit made emphatic declarations that the issue of whether allotments were mandatory was not before them. *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492, 497 (4th Cir. 1973). Most courts have found allotment mandatory.[23] However, even if the Court held allotment discretionary, the actions of the Administrator constitute a *per se* abuse of discretion and are reviewable by the Court. If allotment is held to be non-mandatory, then the issue is whether the Administrator's decision to allot only 45% of the authorized amount constituted a *per se* abuse of discretion.

The standards as contained within the Act show that 45% allotment is a *per se* abuse of any arguable discretion since the goals of the Act cannot be accomplished at this rate of allotment. The purpose of establishing contract authority as the method of funding was to facilitate state planning. A cut of 55% in the amount of the funds allotted inhibits the ability of the

[23] *See id.*

states to plan and thus frustrates the intent of Congress. As a result of the Administrator's actions the states are unable to make long range plans, with the result that the cities are unable to determine the amount of funding they will receive from the state. *See* p. 24-25 *supra*.

As previously stated, the amount allotted was deemed by Congress to be the "minimum amount needed" to attain the goals of the Act. *See* 118 CONG. REC. S16870-71 (daily ed. Oct. 4, 1972) (remarks of Senator Muskie). Therefore, a cut of more than half the funds, before the Administrator has evaluated any state plans or surveys, cannot be made without completely frustrating the goals of the Act; and frustrating the goals of the Act is not a power within the discretion of any administrator.[24] In order for the goals of the program to be accomplished by 1985 it is essential that the states know how much money is available for which they can attempt to qualify.

In reviewing the Administrator's actions the Court must consider "whether the decision was based on a consideration of the relevant factors . . . ." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). On November 22, 1972, President Nixon announced that the amounts allocated under the Act would be considerably reduced from the amounts authorized. This announcement was made prior to any administrative examination of proposed state plans or surveys and therefore apparently was not based on relevant water quality factors. In fact, the expressed justification was not based on water quality factors:

> These amounts will provide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available

[24] Even if discretion is available, allotting 45% of the authorization is a per se abuse of discretion since the 1973 "Needs Survey" indicates that the states presently need at least 60 billion dollars to implement their plans. USEPA, *Report to the Congress: Costs of Construction of Publicly-Owned Wastewater Treatment Works*, A-2, B-1 (1973).

> for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt

Letter from President Nixon to William D. Ruckleshaus, EPA Administrator, November 22, 1972, reproduced in *Hearings on Federal Budget for 1974 Before the House Comm. on Appropriations*, 93d Cong., 1st Sess. 194-95 (1973); see Brief for Petitioner at 41. Further, the Administrator directly states in his brief that he may exercise allotment discretion "in the interest of overall government fiscal policies that are not related to the particular program involved." Brief for Petitioner at 10.

Fiscal considerations are the same rationale used by President Nixon in vetoing the water bill. While an acceptable reason for veto, fiscal considerations are unrelated to the implementation of the Act itself. Such extrinsic considerations were attacked in *State Highway Comm'n v. Volpe*, 479 F.2d 1009, 1114-15 (8th Cir. 1973):

> We find nothing within these provisions of the [Highway] Act which explicitly or impliedly allows the Secretary to withhold approval . . . for reasons remote and unrelated to the Act.
>
> . . . .
>
> When the provisions of the Federal-Aid Highway Act are considered as a whole, it is apparent that the Secretary does not have the authority to withhold funds for anti-inflationary purposes.

The statute in the instant case does not contain provisions for withholding for the purpose of controlling inflation. The court in *State Highway Comm'n v. Volpe*, 479 F.2d at 1114, stated that:

> It is impossible to find from these specific grants of authority discretion in the Secretary to withhold approval on projects Congress has specifically directed because of a system of priorities the Executive chooses to impose on all expenditures.

It is clear that the decision not to allot 55% of the funds authorized is an abuse of discretion, since it cannot be shown that the President's decision was based on a consideration of factors relevant to implementation of the program. In sum, the withholding in the instant case would be a *per se* abuse of any available discretion for two reasons. First, the 55% withholding totally frustrates the purposes of the program and secondly the reasons for impounding were irrelevant considerations.

II. REFUSAL TO ALLOT FIFTY-FIVE PERCENT OF THE AUTHORIZED FUNDS IS OUTSIDE THE CONSTITUTIONAL AUTHORITY OF THE EXECUTIVE BRANCH.

A finding on constitutional authority is not imperative to render a decision in the instant case since an order could be issued to the Administrator to follow mandatory provisions of the Act and, given compliance, there would be no necessity to hold on a constitutional basis.[25] However, impoundment is a pervasive issue which has given rise to extensive litigation. Further, the President[26] as well as his spokesmen[27] have directly asserted the constitutional authority to impound. An opinion from the Court on the constitutional framework for impoundment would therefore prove valuable as a guideline to lower courts. However, it should be noted that the newly enacted Budget and Impoundment Control Act of 1974 may have a profound effect on the impoundment issue and assertions of constitutional authority.[28]

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[25]However, the Administrator does allude to the constitutional authority of the President to control expenditures. Brief for Petitioner at 12.

[26]*See* note 39 *infra*.

[27]*Id.*

[28]*See* note 71 *infra*.

A. THE "FAITHFULLY EXECUTE" CLAUSE OF THE CONSTITUTION DOES NOT ACCORD DISCRETION TO REFUSE TO IMPLEMENT CONGRESSIONAL ENACTMENTS.

The Executive argues that the "faithfully execute" clause confers the right to selectively enforce or "harmonize" allegedly conflicting statutes involving federal spending. The Administrator states:

> [the President] has the responsibility to evaluate the competing needs of this program and other claims on the limited total federal financial resources from which all expenditures are made.

Brief for Petitioner at 12. This argument implicitly interprets "faithfully execute" as a grant of discretion and authority. In fact, the faithfully execute clause represents a duty to perform rather than a grant of discretion. The Executive must attempt to execute the laws in good faith -- not circumvent the intent of Congress.

Conflict purportedly results when Congress appropriates more funds than are allowed to be spent under limited revenues and a debt limit. However, this conflict, when and if it exists, need not be resolved by unilateral executive impoundment.

Even assuming arguendo that such a conflict was presented in this case, Congress has specified procedures for the Executive to follow in such an event. In the Budget and Accounting Act of 1921, section 202, 31 U.S.C. §13 (a) (1970), the Congress provided that if estimated revenues for the fiscal year plus estimated Treasury surplus carried over into that year are less than projected expenditures, then "the President in the Budget *shall* make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency." (emphasis added). The legislative history of this section clearly indicates that the word "shall" was inserted to mandate the Executive to return to the Congress and not to

take unilateral action. Significantly, in the precursor of this section the language was permissive and not mandatory.[29]

Notably, the Executive has often requested Congress to increase the debt ceiling to meet excess expenditures. In fact, from March 15, 1972 to date, Congress has adjusted the ceiling five times.[30] These legislative responses indicate Congress generally favors increased spending over maintenance of the existing public debt and does not wish substantive programs to be sacrificed to maintain that ceiling. *See* Note, *Impoundment of Funds* 86 HARV. L. REV. 1505, 1522 (1973).

Further, as a temporary expedient, the Executive could draw upon the Treasury's cash reserve of $6 billion and margin for contingencies of $3 billion to avoid exceeding the debt limit. Congress has acknowledged that this $9 billion could be drawn upon to pay obligations without extending the debt limit. S. REP. NO. 1292, 92d Cong., 2d Sess. 5-6 (1972); *see* S. REP. NO. 249, 93d Cong., 1st Sess. 10 (1973). Therefore, before there is even a remote possibility of a conflict with the debt ceiling, the Executive could draw upon the $9 billion cushion for a considerable

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[29] The predecessor to 31 U.S.C. §13 (a), the "Smith Amendment," 35 Stat. 1027, March 4, 1909, read as follows:

> [To] the end that [the President] *may* . . . advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, if such reduction be not in his judgment practicable without undue injury to the public service, that he may recommend to Congress such loans or new taxes as may be necessary to cover the deficiency. (emphasis added).

The essence of the "Smith Amendment" was later incorporated into the Budget and Accounting Act of 1921, 31 U.S.C. §13. The principal difference between the original language and the amended language is that "may recommend" was changed to "shall recommend."

[30] Pub. L. No. 93-173 (Dec. 1, 1973), 87 Stat. 691; Pub. L. No. 93-53 (July 1, 1973), 87 Stat. 134; Pub. L. No. 92-599 (Oct. 27, 1972), 86 Stat. 1324; Pub. L. No. 92-336 (July 1, 1972), 86 Stat. 406; Pub. L. No. 92-550 (March 15, 1972), 86 Stat. 63, 31 U.S.C.A. §757 (b), note (Supp. 1974).

period of time without first having to return to Congress with new recommendations.[31]

Significantly, the statutory procedure required by 31 U.S.C. §13 (a) and the other alternative modes of solution to the alleged debt ceiling conflict present a strikingly similar parallel to the situation facing President Truman during the "Steel Seizure Crisis." The Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), struck down the President's attempted seizure of the steel mills, holding that the seizure could not be justified under his constitutional powers. In 1947, Congress, in rejecting an amendment granting power to seize private industries in emergencies,[32] expressed its view that it would prefer to deal with such problems itself on an ad hoc basis pursuant to presidential recommendations. 343 U.S. at 599-600 (Frankfurter, J., concurring); *see* 93 CONG. REC. 3637-45 (1947).

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[31] In some circumstances the Government might even be able to extend payments of contracts by a few weeks, so that outlays would occur in the next fiscal year. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1522 (1973). In fact, this Administration has on one occasion delayed payment of general revenue sharing disbursements so as to be accounted for in the succeeding fiscal year. THE BUDGET OF THE UNITED STATES GOVERNMENT, 1974 -- APPENDIX 764 (1973); *see* Pub. L. No. 92-512, §102, 86 Stat. 919, 31 U.S.C.A. §1221 (Supp. 1974).

[32] Notably, the prior congressional rejection of the power exercised by President Truman is directly analogous to the case at bar. In recent action on the public debt, Congress increased the borrowing power of the Government while rejecting a limit on fiscal 1973 expenditures. Pub. L. No. 92-599 (Oct. 27, 1972), §201, 86 Stat. 1324, reprinted in 1972 U. S. CODE CONG. & ADM. NEWS 1542. Congress specifically voted on and rejected two amendments which would have given the Executive the discretionary power to impound appropriated funds. 118 CONG. REC. H10282-84 (daily ed. Oct. 18, 1972); *id.* at H10224-34, S18506, S18508, S18510, S18512-30 (daily ed. Oct. 17, 1972); *id.* at H9363-401 (daily ed. Oct. 10, 1972). *Compare* H. R. REP. NO. 1614, 92d Cong., 2d Sess. 3-4 (1972), reprinted in 1972 U. S. CODE CONG. & ADM. NEWS, 4976-77, *with* H. R. REP. NO. 1606, 92d Cong., 2d Sess. 3-4 (1972), reprinted in 1972 U. S. CODE CONG. & ADM. NEWS 4972-73; *see* S. REP. NO. 1292, 92d Cong., 2d Sess. 1-2, 7-9 (1972), reprinted in 1972 U.S. CODE ADM. NEWS 4948-49, 4954-56.

That is precisely the policy expressed in 31 U.S.C. §13 (a): The President cannot unilaterally *do* that which he can only *recommend*. As Justice Clark stated: "[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis. . . ." 343 U. S. at 662. Thus, given the several alternatives available to the Executive to deal with the alleged conflict between the debt ceiling and appropriations, the executive branch should choose one of them rather than circumvent the intent of a congressional enactment, as it has done in the instant case by reducing allotments.[33]

Therefore, the debt ceiling conflict cannot serve as a legal justification for the unilateral termination of a congressionally authorized program. The Administrator has alleged only a potential conflict. Even if such conflict were real, statutory procedures are available to resolve the conflict, procedures which the Executive has failed to follow. Moreover, as *Youngstown* has determined, when a subject is within the purview of congressional power, and Congress has acted, the President may not act in contravention of the stated legislative policy. 343 U.S. at 586-89.

Further, the Executive has urged the responsibility to manage the economy under the 1946 Employment Act, 15 U.S.C. §§1021-25 (1970), as conflicting with expenditure statutes.[34]

[33]Whatever the merit of Administrator's reliance on the debt ceiling, it is clearly a reason collateral to and remote from the purposes of the water pollution control program. Therefore, it falls within the prohibition established by *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973), where the court held that the Secretary of Transportation could not withhold funds from state highway programs for reasons remote from and unrelated to those which Congress had established. *See* Guadamuz v. Ash, 368 F. Supp. 1233, 1241 (D.D.C. 1973).

[34]OMB Report Under Impoundment & Information Act, 39 Fed. Reg. 7707, 7708 (1974), reprinted in 120 CONG. REC. S4616, S4617 (daily ed. Mar. 28, 1974); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 97 (1971) (testimony of Caspar Weinberger).

The Employment Act was designed to institutionalize the budget as an economic tool. S. BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 11-12 (1950). The Employment Act itself gives no particular power to the President. In fact, it limits him to an advisory role and places enactment power in Congress. There is no reference to inflation in the Act, and the timing of its passage immediately after World War II confirms that the main concern was promoting an economy able to provide jobs for the returning veterans, rather than fighting inflation.[35] In its original form the bill was titled *Full* Employment Act and was dedicated to that goal. S. BAILEY, *supra; see* 15 U.S.C. §1021 (1970). A logical construction of the Employment Act indicates that it contemplates final policy determinations being made by Congress. Although recommendations from the President are envisioned, the provisions for a congressional committee indicate the intent for ultimate legislative input. *See* 15 U.S.C. §§1022-24 (1970). The Act would, therefore, not justify impoundment without review or approval by Congress.[36] *See Massachusetts v. Weinberger*, Civil No. 1308-73 (D.D.C., July 26, 1973), reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973). *See also Louisiana v. Weinberger*, 369 F. Supp. 856, 864 (E.D. La. 1973).

[35]Economic studies have raised questions as to the efficacy of impoundment as a fiscal tool. The studies indicate that current impoundments have caused some unemployment and have failed to significantly reduce inflation. Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615, 620-21 (1974); Findings of McIntosh Foundation Executive Impoundment Project, 119 CONG. REC. S21120, S21124 (daily ed. Nov. 27, 1973).

[36]The Administration has also cited the Economic Stabilization Act Amendments of 1971, 12 U.S.C. §1094 (Supp. II 1972), as a broad grant of power to the President to impound for economic reasons. OMB Report Under Federal Impoundment & Information Act, 38 Fed. Reg. 19,582 (1973). However, amendments enacted in 1973 contain a direct prohibition of impoundments under the Act. Pub. L. No. 93-28 (Apr. 30, 1973), §4, 87 Stat. 27, 12 U.S.C.A. §1904, note (Supp. 1974).

Thus, when juxtaposed with the statutory mandate of the Water Pollution Control Act for full allotment and the policy that the waters of America be restored by 1985, neither the debt ceiling nor the 1946 Employment Act present the Executive with conflicting statutory responsibilities so as to justify unilateral reduction of allotment under the "faithfully execute" clause. Reason and precedent dictate that the direction to "faithfully execute" is not a carte blanche to arbitrarily curtail some programs and execute others. *See National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 901 (D.D.C. 1973). *See also National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (1974). In a memo regarding impoundment written while an Assistant Attorney General, Justice William Rehnquist reasoned: "[I]t seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them."[37] Further, the Court has stated:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissable.

Kendall v. United States ex rel. *Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838).

The Executive's failure to faithfully execute the Water Pollution Control Act, by refusing to allot, amounts to legislation, a power clearly prohibited to the Executive. *See Local 2677, AFGE v. Phillips*, 358 F. Supp. 60, 76-77 (D.D.C. 1973). *See also Guadamuz v. Ash*, 368 F. Supp. 1233, 1241-42 (D.D.C. 1973). In the Federal Convention of 1787, the States unanimously rejected a motion "that the National Executive have a power

[37] Memo from William Rehnquist reproduced in *Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 390, 394 (1973)

to suspend any Legislative act . . . ."[38] As the Court stated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."

Clearly, the faithfully execute clause does not authorize the Executive's actions in the instant case. In fact, the clause prohibits and condemns the failure to fulfill the mandate of the Water Pollution Control Act.

B. THE EXECUTIVE DOES NOT HAVE INHERENT AUTHORITY TO REFUSE TO CARRY OUT THE PURPOSES AND PROVISIONS OF CONGRESSIONAL PROGRAMS DULY ENACTED INTO LAW.

The President asserts that he has the inherent power to impound,[39] on the basis of the constitutional provision that "[t]he executive Power shall be vested in a President of the United States of America." U. S. CONST. art. II, §1. In determining the extent of power inherent in the presidency, there are generally three criteria: (1) the lack of an express constitutional commitment of power to a coordinate branch or of an express prohibition of its exercise by the President; (2) the historical and customary exercise of a power by the Executive over a

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[38] H. R. DOC. NO. 398, 69th Cong., 1st Sess. 152 (1927) (Documents Illustrative of the Union of American States); *see id.* at 753.

[39] At a news conference held in January, 1973, the President stated:

> The constitutional right for the President of the United States to impound funds and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people, that right is absolutely clear.

9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 11 (1973). *See also Join. Hearings on S. 373, supra* note 37, at 270 (statement of OMB Director Roy Ash); *id.* at 369 (statement of Deputy Attorney General Joseph Sneed); *id.* at 836-37 (Dep't of Justice Answers to Questions Concerning Impounding of Appropriated Funds Posed by Sen. Ervin in his letter of Feb. 14, 1973, to the Dep. Att'y Gen.).

long period of time, coupled with tacit or express congressional approval; and (3) the existence of a situation that necessitates executive action for the public interest. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 534-35 (1871).

No provision of the Constitution clearly commits the "impoundment" power to a coordinate branch or explicitly prohibits its exercise by the President. The grant of the appropriation power to Congress does not, on its face, give Congress power over the manner in which appropriations are executed, although this extension may be reasonably implied as a necessary adjunct. However, other constitutional provisions bear directly on the issue and provide a textually demonstrable commitment of the power to make policy as distinguished from merely spending. Article I of the Constitution vests the legislative power in the Congress. This implies that Congress alone shall determine national policy except: (1) when a veto is sustained; (2) when a statute is declared unconstitutional, or (3) when the Constitution commits certain policymaking power to another branch.[40] One of the principal methods by which Congress can determine national policy is by enacting authorization or appropriation bills. Thus, if the Executive impounds funds or terminates programs and thereby frustrates the congressional policy underlying the authorization or appropriation, he usurps the policymaking power, which article I vests in Congress. Therefore, as to impoundments that affect legislative policy, a textually demonstrable commitment is present

[40] Levinson & Mills, *Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 193 (1974).

which precludes exercise of inherent presidential authority.[41]

Where the text is unclear, the standard is whether the practice is one of long standing and whether action or inaction of Congress has added a gloss to presidential powers. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court ruled that the President was the nation's representative in foreign affairs and cited prior congressional acts which took cognizance of that fact. In *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), the Court found that even congressional silence could acknowledge the existence of an executive power. The Court emphasized, however, that the holding did not "mean that the Executive [could] by his course of action create a power." *Id.* at 474. Thus, even though an act may continually occur, it may still be unconstitutional.

The President is currently relying heavily on long standing congressional inaction in the face of ongoing impoundment.[42] However, the historical argument as applied to the instant case and other contemporary impoundments is without support since President Nixon's impoundments are significantly different from those of past administrations.[43] Before Franklin

[41] *See* Louisiana V. Weinberger, 369 F. Supp. 856, 864-65 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1241, 1243-44 (D.D.C. 1973); Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash, 365 F. Supp. 1355, 1360-61 (D. N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D. D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724, 728 (W. D. Okla. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 76-78 (D. D.C. 1973); American Ass'n of Colleges of Podiatric Medicine v. Ash, Civil No. 1139-73, Slip Op. at 3 (D. D.C., Oct. 26, 1973); Massachusetts v. Weinberger, Civil No. 1308-73 (D. D.C., July 26, 1973) reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973); National League for Nursing v. Ash, Civil No. 1316-73, Slip Op. at 4 (D. D.C., July 10, 1973).

[42] *See Joint Hearings on S.373, supra* note 37, at 359 (remarks of Dep. Att'y Gen. Sneed).

[43] Levinson & Mills, *Impoundment: A Search for Legal Principles, supra* note 40, at 198-99 (1974); *see* Fisher, *Impoundment of Funds: Uses and Abuses*, 23 BUFFALO L. REV. 141, 143-70 (1973); Miller, *Impoundment: The New Constitutional Crisis*, THE PROGRESSIVE, March 1973, at 15.

D. Roosevelt there were but isolated instances of impoundment.[44] President Roosevelt impounded only public works and military appropriations.[45] The administrations of Presidents Truman, Eisenhower, and Kennedy reveal no pattern of impounding domestic non-military appropriations.[46] Further, two Presidents specifically stated they felt they did not have the power to affect statutory policy by controlling spending.[47] Not until the Johnson Administration have amounts been impounded from domestic programs for fiscal reasons. However, the Johnson precedent, less than ten years old, provides no support for similar action by his successors. The Nixon impoundments, while similar in the aggregate amounts involved, are qualitatively different. The Johnson impoundments had relatively minor impact upon most programs.[48] In contrast, President Nixon has deliberately and frankly imposed his own

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[44]*See* Stanton, *The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25, 26-28 (1973).

[45]Williams, *The Impounding of Funds by the Bureau of the Budget*, reprinted in *Joint Hearings on S.373*, *supra* note 37, at 844.

[46]*See* Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROB. 135, 162 (1972).

[47]With regard to his own exercise of spending discretion, President Franklin D. Roosevelt, a proponent of a strong presidency, stated: "[o]ur statutory system of fund apportionment is not a substitute for item or blanket veto power and should not be used to set aside or nullify the expressed will of Congress. . . ." Letter from President Roosevelt reproduced in part in *Hearings on H. R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1944). President Kennedy also rejected a broad power to impound with regard to federal funds to be given to segregated schools. Although he believed such funding violated the equal protection and due process clauses as interpreted by the Court, he stated: "I don't have the power to cut off the aid in a general way . . . and I think it would probably be unwise to give the President of the United States that kind of power." N. Y. Times, April 20, 1973, at 11, col. 5.

[48]Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1512 (1973); Findings of McIntosh Foundation Executive Impoundment Project, 119 CONG. REC. S21120, S21125 (daily ed. Nov. 27, 1973).

priorities,[49] and has thereby frustrated the intent of Congress with regard to numerous domestic programs.[50] This policy-oriented series of impoundments is unsupported by tradition[51] and, therefore, can not justify reliance upon inherent authority as a predicate for terminating congressionally authorized programs.

The public interest factor, the third criterion for recognition of inherent executive power, applies only to short-term reactions to emergency situations. In re *Neagle*, 135 U.S. 1 (1890), where legislative ratification is expected. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In the instant case no such emergency has even been alleged by the Administrator. Further, even a purported "national emergency" is not always sufficient to sustain a claim of inherent power. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952), the Court ruled that the President was not empowered to seize the steel mills in order to maintain production for the war effort.

Moreover, even if a "national emergency" of a magnitude to justify 55% allotment reduction was in existence, there is no expectation of legislative ratification. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). To the contrary, congressional response to this kind of behavior by the Executive has been severe.[52]

[49] It is difficult to deny that President Nixon himself felt that allotment of authorized funds was mandated by the Act, precisely because he vetoed it on the grounds that it was too expensive. There was no point in the veto if the unfettered discretion the President now asserts had existed. In effect, the President has reinstated the veto which Congress overrode by merely reading the statute as he chose.

[50] Fisher, *Impoundment of Funds: Uses and Abuses*, *supra* note 43, at 169-88; Levinson & Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615, 618, 620 (1974); Levinson & Mills, *Impoundment: A Search for Legal Principles*, *supra* note 40, at 199.

[51] *Id.*; *Joint Hearings on S. 373*, *supra* note 37, *passim*; *Hearings on Executive Impoundment*, *supra* note 34, *passim*.

[52] The new Congressional Budget and Impoundment Control Act of 1974 has restricted authority to accomplish withholding such as that accomplished in the instant case. See note 71 *infra*.

Another limitation to inherent power, which is particularly related to President Nixon's impoundments, was stressed in *Curtiss-Wright*, 299 U.S. 304 (1936), where the Court recognized a distinction between inherent power in the realms of foreign policy and domestic affairs. The Court stated that inherent powers were much more restricted in the domestic arena, *id.* at 320, in which most of President Nixon's impoundments have occurred, including the instant case. *See* OMB Report Under Federal Impoundment & Information Act, 38 Fed. Reg. 19,581 (1973). Thus, the impounding of domestic programs can derive little authority from the President's foreign affairs powers. *See Guadamuz v. Ash*, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 901 (D.D.C. 1973). To conclude otherwise would justify domestic executive action on a foreign policy basis for almost any act imaginable. The distinction between the President's domestic and foreign affairs powers is meaningful only upon the assumption that some activities are regarded, for these purposes, as being too remote from foreign affairs. Impoundment of domestic program funds has only an indirect connection with foreign affairs, and does not invoke the foreign affairs power in the way indicated by *Curtiss-Wright*.

No constitutional authority in the Executive, inherent or otherwise, grants the power to usurp prerogatives of another branch or ignore duly enacted laws. The Constitution recognizes specifically the Executive's role regarding the enactment of laws. The concept of inherent authority cannot be used as a means of appending an unconstitutional veto power to the legitimate executive duty to implement legislative policy. The President must not be allowed to accomplish through impoundment that which he could not accomplish through veto of the Water Pollution Control Act.

C. THE EXECUTIVE'S REFUSAL TO IMPLEMENT THE WATER POLLUTION CONTROL ACT, EVEN AFTER PASSAGE OVER AN EXECUTIVE VETO, REPRESENTS AN UNCONSTITUTIONAL EXPANSION OF THE VETO POWER.

The President's role in legislation is made clear in the veto provision of the Constitution. Art. I, §7. When Congress passes a bill, the President has the power to veto it, after which it returns to Congress and may be overridden. Discussions of the veto power in the Constitutional Convention show that a veto without override was considered (termed "absolute negative") but was rejected unanimously as placing too much authority in the hands of a single man.[53] In the case at bar, the unilateral refusal to implement a duly enacted statute deprived Congress of its constitutional opportunity to override President Nixon's "veto" accomplished by means of impoundment. If the President frustrates the will of Congress by impounding, with no opportunity for congressional override, he achieves the equivalent of an absolute veto. In the instant case, the use of the constitutional veto had already been overriden and the impoundment operated as a second and absolute veto.

Moreover, the Executive in the instant case has exercised an unconstitutional item veto by failing to allot 55% of authorized funds, while allotting the balance. The Constitution makes no provision for an item veto and the numerous proposals to introduce this feature into the Constitution have been rejected.[54]

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[53] 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 151-54, 536-38 (ed. 1941).

[54] E. CORWIN, THE PRESIDENT OFFICE AND POWERS 280 (4th ed. 1951); R. WALLACE, CONGRESSIONAL CONTROL OF FEDERAL SPENDING 141-42 (1960); *see* Note, *The Item Veto in the American Constitutional System*, 25 GEO L. J. 106 (1936); *Joint Hearings on S.373*, *supra* note 37, at 110-14 (Attachment to Statement of Comp. Gen. Elmer Staats).

Congress overrode the presidential veto of the Act by a substantial margin and it should have henceforth been implemented consistent with the expressed will of the Act. Refusal to carry out the Act amounted to a circumvention and an addition to the constitutional process of veto.

III. THE SOVEREIGN IMMUNITY DOCTRINE IS NO BAR WHEN THE ADMINISTRATOR FAILS TO PERFORM A STATUTORY DUTY OR EXCEEDS HIS DISCRETION.

The assertion of sovereign immunity has been almost uniformly rejected in impoundment cases[55] and does not present a bar to justiciability in the instant case. Rejection of sovereign immunity is supported by the reasoning that the doctrine is not intended to protect actions outside the law. The doctrine of sovereign immunity has been continually eroded both through specific waivers[56] and a general narrowing of the doctrine[57] although it is still routinely raised by the Government.[58]

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[55] New York v. Train, 494 F.2d 1033, 1038-39 (D.C. Cir. 1974); Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 495 (4th Cir. 1973); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1123 (8th Cir. 1973); Louisiana v. Weinberger, 369 F. Supp. 856, 861-62 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 68-69 (D.D.C. 1973). *But see* Housing Authority of San Francisco v. HUD, 340 F. Supp. 654, 656 (N.D. Cal. 1972); San Francisco Redevelopment Agency v. Nixon, 329 F. Supp. 672 (N.D. Cal. 1971).

[56] Two major examples of general waivers of immunity are the Tucker Act, 28 U.S.C. §1491 (1970), and the Tort Claims Act of 1946, 28 U.S.C. §1346 (b) (1970); specific statutes also allow suit against individual agencies, *see, e.g.*, Housing Act of 1937, 42 U.S.C. §§1401-35 (1970).

[57] *E.g.*, Land v. Dollar, 330 U.S. 731 (1947)

[58] *See Hearings on "Sovereign Immunity" Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess 28-30, 64-75 (1970)

A. THE ADMINISTRATOR'S ACTIONS ARE IN VIOLATION OF HIS LEGAL DUTIES UNDER THE ACT AND CONSEQUENTLY SUIT MAY BE BROUGHT THROUGH AN "OFFICER SUIT," A WELL ESTABLISHED EXCEPTION TO SOVEREIGN IMMUNITY.

Judicial review has been made available when the officer or federal agency has acted in excess of its statutory authority, acted in an unconstitutional manner, or acted pursuant to an unconstitutional grant of authority. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949). In addition, *Rockbridge v. Lincoln*, 449 F.2d 567, 572-73 (9th Cir. 1971), established that the exception applies when an official fails to perform a statutory duty. An action, within the exception to the doctrine, against an official or agency is commonly known as an "officer suit." The philosophy behind the exception to the sovereign immunity doctrine is expressed in *The Floyd Acceptances*, 74 U. S. 666, 676-77 (1868):

> We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.

It is explicitly alleged in the instant case that the Administrator not only acted beyond his statutory authority in failing to comply with the mandatory allotment, but he also acted in an unconstitutional manner. All courts which have ruled on the Water Pollution Control Act impoundments have found that sovereign immunity presents no bar to judicial review when

there is an allegation and subsequent finding of violation of statutory or constitutional duty.[59]

Of the over sixty impoundment cases decided to date[60] in

[59]Judge Merhige, in *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 694-95 (E.D. Va.) remanded with directions *sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), held:

> the instant matter squarely falls . . .within a well-settled exception to the sovereign immunity doctrine . . . .suit may be brought against an officer of the United States to challenge an action which *allegedly* exceeds statutory authority or, if within the scope of authority, is premised upon a power which is unconstitutional . . . .The complaint alleges that the defendant has exceeded his statutory authority in impounding funds. If sustained on the merits, plaintiff will come within the above recited exception to the doctrine. (emphasis added).

In *New York v. Ruckelshaus*, 358 F. Supp. 669, 673 (D.D.C. 1973), *aff'd sub nom New York v. Train*, 494 F.2d 1033 (D.C. Cir. 1974), Judge Gasch held:

> plaintiff's action falls squarely within the exception covering suits challenging actions by federal officers which go beyond the scope of their statutory powers.

The court in *Brown v. Ruckelshaus* noted:

> Both complaints *allege* that the EPA has exceeded its statutory authority in impounding the authorized funds. If sustained on the merits, Congressman Brown and Los Angeles would fall within the exception . . . .

364 F. Supp. 258, 261 (C.D. Cal. 1973) (emphasis added). *See* New York v. Train, 494 F.2d 1033, 1038 (D.C. Cir. 1974); Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 495 (4th Cir. 1973). Further, other courts considering impoundment cases have consistently ruled that allegations of breach of statutory duty defeat any claim of sovereign immunity. In *Louisiana v. Weinberger*, 369 F. Supp. 856, 861-62 (E.D. La. 1973), the court maintained:

> It has now been held in several cases that the sovereign immunity doctrine does not bar impoundment suits which are based on the *allegation* that defendants' actions are beyond the scope of their statutory authority and are, therefore, unconstitutional. (emphasis added).

[60]The most comprehensive collection of impoundment cases decided by federal courts is L. FISHER, COURT CASES ON IMPOUNDMENT OF FUNDS: A PUBLIC POLICY ANALYSIS. (Congressional Research Service, Library of Congress, multilith, March 15, 1974).

which sovereign immunity has been raised, only one has accepted the defense of sovereign immunity.[61] *Housing Authority of San Francisco v. HUD*, 340 F. Supp. 654, 656 (N. D. Cal. 1972). In this case, the district court interpreted the statute involved to be discretionary. Sovereign immunity applied since the Administrator, in the court's understanding, acted within the discretionary language. Given this conclusion, the holding is consistent with the doctrine of *Larson*.

An additional restriction to waiver of sovereign immunity exists where a judgement "would expend itself on the public treasury or domain or interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738 (1947). This was further detailed by the Court in *Larson* to allow sovereign immunity to prevent a suit where judgement "will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Finance Corp.*, 337 U.S. 682, at 691 n.11 (1949). The Ninth Circuit interpreted *Larson* as applying where "relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm." *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969).

The instant case involves no expenditure on the treasury or interference with public administration. If anything, the action in the case at bar promotes compliance with public administration according to the law. Further, there is no expenditure from the treasury for two reasons. First, ordering the

[61] In another case, *San Francisco Redevelopment Agency v. Nixon*, 329 F. Supp. 672 (N. D. Cal. 1971), the district court avoided consideration of the exception to sovereign immunity by simply holding that mandamus would not lie to force President Nixon to allot funds. The court believed it could not direct a mandate toward the person of the President. This view, however, has been overruled. *E.g.*, National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974).

Administrator to allot results only in funds being made available for obligation and does not result in expenditure.[62] Second, the funds are already authorized to be expended by law; there is no unconsented drain on the treasury -- "the sovereign" has already consented to expenditure by making a law allowing expenditure.[63] The Ninth Circuit in *Rockbridge* similarly reasoned:

[62]In *New York v. Ruckelshaus*, 358 F. Supp. 669, 673 (D.D.C. 1973), Judge Gasch held:

> Defendant is not aided by the general rule set forth in *Land v. Dollar* . . . for . . .the relief sought by plaintiff in this action does not require the *expenditure* of unappropriated public funds (or indeed of any public funds at all), nor will it interfere with the lawful exercise of defendant's discretionary powers under the Act . . . . Plaintiff is demanding only that funds be *allotted* as, in its view, Congress required.

Similarly, it was held in *Brown v. Ruckelshaus*, 364 F. Supp. 258, 261 (C.D. Cal. 1973):

> Here the suit is . . .requesting relief that does not require the *expenditure* of any unappropriated funds. They only ask for the allotment of the funds, and the EPA retains the discretion not to incur any obligation to expend them. There is no interference with the lawful exercise of Defendant's discretionary powers under the Act.

The district court in *Texas v. Fri* held:

> the relief would not cause the *expenditure* of any unappropriated funds but only the *allotment* to the States of such funds . . . .While these funds would become available for obligation, they would not thereby become obligated until Defendant approves a specific grant.

No. A-73, CA-38, Slip Op. at 3 (W.D. Tex., Oct. 2, 1973), *appeal argued*, No. 73-3965, 5th Cir., Apr. 29, 1974.

[63]Lower courts have consistently held that sovereign immunity is not a bar if the funds to be expended have already been authorized or appropriated by Congress. In *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973), the court held:

> [A]ny affirmative order of this Court would be premised on a determination that official action by the defendants in refusing to spend is beyond their statutory or constitutional powers. This would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act. Accordingly, there can be no effective assertion of sovereign immunity and the defendants' actions are reviewable by the courts.

(cont'd)

> Appellants are not seeking money damages from the government, nor are they seeking to assert some right against it or to block a government project. The relief they seek does not in any way affect the sovereign power of the United States. The government is not asked to give up a right, to grant a concession, to dispose of property or to relinquish authority. Appellants merely seek a court order directing certain government officials to perform acts which Congress has already directed those officials to perform . . . .

449 F.2d 567, 573 (9th Cir. 1971).

Judgement in the case at bar is not an "intolerable burden" but merely an enforcement of a duty. The action does not seek the actual expenditure of funds, but is only seeking performance of a ministerial act. The Executive may not rely on the doctrine of sovereign immunity to frustrate the will of the sovereign. The Constitution vests control over the government's property and grants the power to appropriate and legislate to Congress. When Congress enacts a law to expend, as with the Water Pollution Control Act, enacted over presidential veto,

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[53] (cont'd)

The district court in *Local 2677, AFGE v. Phillips*, 358 F. Supp. 60, 68-69 (D.D.C. 1973), held:

> the relief which the Plaintiffs seek would not be a drain on the public purse. No injunction to spend unappropriated funds is sought . . . [A]ny order of this Court requiring the defendant to act in accordance with the mandate of Congress would draw upon funds appropriated for that purpose.

In *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973), the Eighth Circuit Court of Appeals maintained:

> we do not consider the court's decree . . as being affirmative in nature. It requires only that the defendent officers cease unauthorized action . . . . The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.

the sovereign has expressed its will.[61] The Administrator alleges "plaintiff is seeking to compel a government official to furnish him with greater government funds than the official believes is appropriate . . . ." Brief for Petitioner at 37-38. The observation is exactly true and demonstrates precisely why states and municipalities must seek to compel the "official" to perform his duty according to statutory intent as interpreted by the Court rather than according to what the official "believes is appropriate."

B. THE ADMINISTRATIVE PROCEDURE ACT OPERATES AS A WAIVER OF SOVEREIGN IMMUNITY AND PERMITS REVIEW OF THE ADMINISTRATOR'S REFUSAL TO ALLOT.

While sovereign immunity can be avoided by the "officer suit," it is also waived by the APA, which would likewise allow review in the instant case. The provision which supports waiver is section 10, 5 U.S.C. §702. Whether section 10 constitutes a basis for waiver of sovereign immunity has been a much debated issue. The Administrator summarily alleges the APA is not a waiver of sovereign immunity, citing *Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1952), in which the statement was made: "Still less is the Act to be deemed an implied waiver of all governmental immunity from suit."

Of course the argument in the instant case is not that there is a general waiver of all immunity but that the APA, in instances where an administrator exceeds his authority, grants the right to review to "[a] person . . . adversely affected or aggrieved by agency action . . . ." 5 U.S.C. §702 (1970).

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[61] In effect, the enactment of legislation to dispose of property is a waiver of sovereign immunity. *See* Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. CHI. L. REV. 328, 349 (1973). Waiver is undisturbed by later administrative actions contrary to congressional policy. Clakamas County v. McKay, 219 F.2d 479, 493 (D.C. Cir. 1954), *vacated as moot*, 349 U. S. 909 (1955).

Sovereign immunity has been increasingly abrogated by findings that the APA is an implied waiver.[65] Three circuits now adopt this position.[66] Although a majority of circuits have not accepted the proposition that the APA is an implied waiver, the better conclusion is that an act which shows as one of its goals reviewability of agency action would contemplate a waiver of sovereign immunity to allow that review.[67] As the D.C. Circuit has reasoned: "It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the review provisions illusory." *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

C. SOVEREIGN IMMUNITY IS SPECIFICALLY WAIVED BY SECTION 505 OF THE WATER POLLUTION CONTROL ACT.

One method of removing sovereign immunity is by specific waiver. The Act contains such provisions under which a citizen is given jurisdiction to sue an administrator for alleged failure to perform an act which is not discretionary under the statute. Respondents in the instant case fall within the purview of the statutory waiver:

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[65]*See* Student Project, *Federal Administrative Law Developments - 1971*, 1972 DUKE L. REV. 115, 244.

[66]Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 1970); Kletschka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969); Estrada v. Ahrens, 296 F. 2d 690 (5th Cir. 1961); *See* Warner v. Cox, 487 F.2d 1301, 1304-05 (5th Cir. 1974) (APA constitutes general waiver except in actions ex contractu for money damages).

[67]*Accord*, Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1191 (D.C. Cir. 1972); Local 2677, AFGE v. Phillips, 358 F. Supp 60, 69 (D.D.C. 1973).

CITIZEN SUITS

Sec. 505 (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --

. . . .

(2) against the Administrator where there is *alleged* a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309 (d) of this Act. [emphasis added]

. . . .

(g) For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected.

GENERAL DEFINITIONS

Sec. 502. Except as otherwise specifically provided, when used in this Act:

. . . .

(5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

The foregoing provisions eliminate the need for the Court to consider jurisdiction over the subject matter and parties to this suit. These provisions require only an allegation that the Administrator has failed to perform a non-discretionary act to acquire jurisdiction. That is the allegation in the instant case with regard to allotment.

It is noteworthy that for the first time, before this Court, the Administrator alleges as a defense Respondents' failure to comply with the sixty-day statutory time limit in section 505(b). It is not appropriate for the Administrator to plead prior ignorance of this provision, for it would then be difficult to argue that Respondents should be held to know what the Administrator did not. Even so, the Administrator could not convincingly plead ignorance, for in *Brown v. Ruckelshaus*, the court noted the temporal defect challenged here, stating that it *might* be grounds for dismissal. 364 F. Supp. 258, 265 n.10 (C.D. Cal. 1973). Notably, the court in *Brown* relegated this point to a footnote and proceeded to hear the case on its merits. Since *Brown* was decided a month before the Fourth Circuit heard Respondent's case, the Administrator should have known about the defense. Thus, by failing to object and pleading the instant case on the merits, the Administrator waived any procedural irregularity arising out of the failure to give notice in exactly the manner prescribed by the statute. *Cf. Arp v. United States*, 244 F.2d 571, 574 (10th Cir.), *cert. denied*, 355 U.S. 826 (1957).

The Administrator has argued that Respondents have access to the district court only under the provisions of section 505(a)(2), even though Respondent did not invoke it. Brief for Petitioner at 40-41. However, section 505(e) specifically states that:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief *including relief against the Administrator* or a state agency). (emphasis added).

This language is expressly contrary to the Administrator's contention that section 505 is the exclusive method for waiver of sovereign immunity. Having alleged that the Administrator has failed to perform a ministerial duty owed to it by the

Administrator. Respondent stands on its invocation of jurisdiction under 28 U.S.C. §1331 and §1361 -- which, according to section 505 (e), it has the privilege of doing.

It is pertinent that section 304 (a) (2) of the Clean Air Act of 1970, 42 U.S.C. §1857 h-2 (b) (2), is substantially the same as section 505 (b) (2) of the Water Pollution Control Act in requiring sixty days notice to the Administrator prior to filing suit. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971). Failure to comply with the sixty-day limit in the Clean Air Act was the subject of *Riverside v. Ruckelshaus*, 4 ERC 1728 (C. D. Cal. 1972), in which the plaintiffs admittedly failed to give the Administrator sixty days notice before filing the action. However, the court found "substantial compliance by plaintiffs within the sixty-day notice provision" because:

1) The plaintiffs filed their complaint on September 6, 1972. Personal service of the complaint on the Administrator constituted actual notice of the plaintiffs' demand for action by the Administrator.
2) Sixty days elapsed between the filing date and the date that hearing on plaintiffs' request for injunction was complete and the court rendered its judgment.
3) During that sixty-day period, the Administrator had all the beneficial effect of the sixty-day notice provision, so that the purposes of the provision were fulfilled.
4) During the sixty-day period in which the action was pending, the Administrator not only failed to comply with plaintiffs' request, he reiterated publicly his intention not to do so.

Id. at 1730-31. All of these elements are also present in the instant case.

Even more to the point is the conclusion of the court in *Riverside* that the complaint itself can consitute notice so long as "diligent prosecution" of the complaint does not commence until sixty days has elapsed. *See* 4 ERC at 1731. *Cf. United States v. Spreckels*, 50 F. Supp. 789, 790 (N.D. Cal. 1943).

Another case, *Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261 (D. D.C. 1973), which considered the effect of the sixty-day limitation under section 505 (a) (2), reached a result comparable to that in *Riverside* under different facts. The *Montgomery* court was considering an "amended complaint" which was, in effect, a supplemental pleading subject to the sixty-day limit. *Id.* at 265. The court felt that since the violations alleged in the supplemental pleading did not create surprise or prejudice the rights of the defendants, nor frustrate the congressional purpose of the provision -- which was "to give the 'State and Federal governments' sufficient time to 'develop fully, and execute the authority contained' in section 1342," there was justification for waiving the provisions for sixty-day notice. *Id.* at 266.

It is clear that the purpose of section 505 (a) (2) is to enlarge citizens' access to the courts to enforce the provisions of the Act. Its function is not, as one court has stated regarding the Clean Air Act, a mechanism whereby failure to precisely comply causes plaintiffs to forfeit their statutory right to be in district court. *Highland Park v. Train*, 374 F. Supp. 758, 768 (N.D. Ill. 1974). Where a statute provides judicial review of an administrative action, it should not be prohibited absent clear and convincing evidence that such denial was the legislative intent. *Cf. City-wide Coalition v. Philadelphia Housing Auth.* 356 F. Supp. 123 (E.D. Penn. 1973).

In *Riverside*, the plaintiffs had the benefit of the regulations promulgated by the Administrator in December 1971 regarding the Clean Air Act. *See* 40 C.F.R. §54.3 (a) (1972). These regulations specified the elements required for giving notice of alleged failure of the Administrator to perform a ministerial act. The requirements are: (1) identification of the provision of the Act allegedly requiring an act by the Administrator; (2) description with reasonable specificity of the Act claimed not done by the Administrator; and (3) name and address of the person giving notice. As the court found, all of these elements

were included in the *Riverside* complaint which constituted compliance with the notice requirements under the regulation. Significantly, all of these elements were also present in Respondents' complaints in the instant case.

In the instant case, however, the Respondents had no benefit of guidelines regarding notice requirements under the 1972 Water Pollution Control Act Amendments. These regulations, 40 C.F.R. §135.3 (b) (1973), were not promulgated until June 1, 1973, some six months after filing of Respondents' complaints. *See Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261, 266 (1973). Thus, Respondents had no regulation regarding notice with which to comply, and as the court in *Riverside* concluded, it is not unreasonable to consider the filing of a complaint as notice. This statement seems especially apt when the requirements for notice are not yet in existence. Moreover, the complaint complied with all the requirements for adquate notice as subsequently defined by the Administrator. 40 C.F.R. §135.3 (b) (1973). Notably, these regulations were virtually identical to those promulgated pursuant to the notice provisions of the Clean Air Act. *Compare* 40 C.F.R. §135.3 (b) *with id.* §54.3 (a).

Petitioner errs in its conception of the application of the sixty-day time limitation. The Administrator reasons that since only forty-eight days elapsed from the Administrator's announcement of abbreviated allotments until filing of Respondent Campaign Clean Water's complaint on January 15, the statute could not have been complied with. Brief for Petitioner at 41. First, this conception ignores the possibility of giving notice under the provision of the Act *before* the public announcement. Even more important, however, if the complaint itself was notice, as stated in *Riverside v. Ruckelshaus*, 4 ERC at 1731, it ignores that the suit was not truly "commenced" until well beyond the sixty days, in the sense that it was not argued until more than sixty days after filing the complaint. Further, the sixty-day notice deadline should not be

applied rigidly when the Administrator can be presumed to have constructive notice of the omission of which Respondent has complained.

Section 207 itself requires that allotment occur not later than thirty days after October 18, 1972. Thus, November 17 was the statutory deadline. If the Administrator is held to notice of what the statute says, the failure to allot fully by November 17 was a violation and the Administrator had notice of his violation under the Act. Thus, filing by Respondent on January 15, 1973, was just hours short of the required sixty-day delay. The notice provision is meant to give the Administrator fair warning of his omission. In the instant case, the Administrator had not only fair warning of the objection to his action in reducing allotment, he was acutely aware of it. There is no persuasive reason for the sixty-day requirement when the Administrator makes clear his intention to behave in a given way according to his own interpretation of the Act. The question then becomes one of law rather than of fact, and no amount of fact-finding by the Administrator will cure the controversy -- only immediate recourse to the courts. As well, the Administrator has not alleged that he received no notice from Respondents. In the absence of promulgated regulations, it would seem only equitable that any communication from Respondent would comply, expecially if it contained at least those elements specified by the Administrator pursuant to the Clean Air Act. Since the Administrator failed to timely promulgate regulations defining notice as explicitly required by section 505 (b) (2), he can hardly be heard to complain if a court's view of "notice" is not his own.

IV. DETERMINING THE ADMINSTRATOR'S AUTHORITY TO ALLOT LESS THAN AUTHORIZED AMOUNTS IS JUSTICIABLE AND NOT BARRED FROM REVIEW BY THE POLITICAL QUESTION DOCTRINE OR THE ADMINISTRATIVE PROCEDURE ACT.

A. REVIEW OF THE ADMINISTRATOR'S FAILURE TO COMPLY WITH THE ALLOTMENT PROVISION OF THE WATER POLLUTION CONTROL ACT IS JUSTICIABLE AND NOT A "POLITICAL QUESTION."

The Administrator has urged that the issue before the Court in the instant case is a non-justiciable political question. Brief for Petitioner at 45, 47-48. Considering the same argument, the court in *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973), stated: "When Congress directs that money be spent and the President, as Chief Executive, declines to permit the spending, the resulting conflict is not political." The court continued: "To say that the Constitution forecloses judicial scrutiny in these circumstances is to urge that the Executive alone can decide what is best and what the law requires." *Id.* at 900-01. The role of the courts in the American system precludes an interpretation which would result in unilateral interpretation of laws by the Executive.[68]

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the court enumerated six conditions that would preclude the hearing of a case under the political question doctrine: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable or manageable standards for resolving the issue, (3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without

[68] "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Administrator in the instant case has specifically argued that the issue before the Court is committed to the "political departments" and that there are no judicially manageable standards for resolving it. Brief for Petitioner at 45, 47.

As to commitment to a coordinate branch, it is clear that the issue before the Court can be determined only by the judicial branch and is not committed to the other "political departments." The issue before the Court is whether the Environmental Protection Agency has exceeded its authority in refusing to allot. The issue is one of statutory interpretation of the Administrator's discretion under the Act. It is axiomatic that "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function." *See Highway Comm'n v. Volpe*, 479 F.2d 1099, 1124 (8th Cir. 1973).

Additionally, judicially manageable standards for resolving the issue *sub judice* are readily available. The issue is not "an unstructured managerial issue." Brief for Petitioner at 48. The mandate for full allotment is expressed in the statute. The interpretation of the statutory duty of an agency is clearly judicially manageable and is a basic function of the judiciary.[69]

[69]Baker v. Carr, 369 U. S. at 211; National Treasury Employees Union v. Nixon, 492 F.2d at 605; State Highway Comm'n v. Volpe, 479 F.2d 1099, 1106-07 (8th Cir. 1973); Louisiana v. Weinberger, 369 F. Supp. 856, 862 (E. D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Brown v. Ruckelshaus, 364 F. Supp. 258, 261-62 (C. D. Cal 1973); Seafarers Int'l. Union of N. America v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973); National Council of Community Mental Health Centers v. Weinberger, 361 F. Supp. 897, 900-01 (D.D.C. 1973); Campaign Clean Water, Inc. v. Ruckelshaus, 361 F. Supp. 689, 696 (E.D. Va.), remanded with directions *sub nom.* Campaign Clean Water, Inc. v. Train, 489 F.2d 492 (4th Cir. 1973); New York v. Ruckelshaus, 358 F. Supp. 669, 675-76 (D.D.C. 1973), *aff'd sub nom.* New York v. Train, 494 F. 2d 1033 (1974); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 67-68 (D.D.C. 1973); Massachusetts v. Weinberger, Civil No. 1308-73 (D.D.C. July 26, 1973), reprinted in 119 CONG. REC. S15044, S15045 (daily ed. July 30, 1973).

The instant case moreover does not require the judiciary to supervise agency action.[70] Only in a totally discretionary statute imposing no duty upon an administrator would a lack of manageable standards exist.

While the political question doctrine may continue to be raised as a bar to impoundment litigation,[71] there is no basis for non-justiciability. The issue presented in the instant case does not fit into the formulations set forth in *Baker v. Carr*, 369 U.S. at 217, relied upon by the Administrator. The Court must merely apply judicial standards of statutory construction to determine whether the Administrator has the discretion to refuse to fully allot authorized sums. The resolution of that issue clearly does not involve a nonjusticiable political question.

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[70] *See* National Treasury Employees Union v. Nixon, 492 F.2d at 605; Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498-99 (4th Cir. 1973), *cert. granted* 94 S. Ct. 1991 (1974); Seafarers Int'l Union of N. America v. Weinberger, 363 F. Supp. 1053, 1059 (D.D.C. 1973); Pealo v. Farmers Home Administration, 361 F. Supp. 1320, 1324 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L. J. 1636, 1651 (1972).

[71] On July 12, 1974, the President signed the Congressional Budget and Impoundment Control Act of 1974, providing *inter alia* for impoundment resolution by the political departments. Pub. L. No. 93-344, 120 CONG. REC. D839 (daily ed. July 15, 1974). The Act may have an effect on future impoundment litigation and perhaps the future disposition of the case *sub judice*, since the Administrator has alluded to the possible use of obligational controls in the event of an adverse holding. Brief for Petitioner at 14. It should be recognized that the Act's procedures for impoundment control could raise the political question issue in the context of a designation to a coordinate branch since Congress is granted the authority to override an impoundment.

Nevertheless impoundment should remain a justiciable issue. The Act explicitly does not ratify or approve "any impoundment heretofore . . . executed or approved by the President or any other Federal officer or employees . . . ." H. R. REP. NO. 1101, 93d Cong., 2d Sess. 40, at §1001 (2) (1974). Further the Act does not affect "in any way the claims . . . of any party

(cont'd)

B. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT BAR REVIEW AS A MATTER COMMITTED TO AGENCY DISCRETION.

The Administrator contends the APA precludes judicial review of his refusal to allot since the agency action at issue is a matter committed to agency discretion. Brief for Petitioner at 41-43. The Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), clarified the provision for preclusion of judicial review expressed in 5 U.S.C. §701 (a). This section was characterized as "very narrow" and limited in application to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410. In determining whether agency actions were reviewable, the Court in *Overton Park* looked to the statute to see if it contained definite standards for the agency head. The Court found reviewable the statute allowing the Secretary to approve a project utilizing public parklands

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[71] (cont'd)

to litigation concerning any impoundment . . . ." *Id* §1001 (3). Additionally, the Act in no way supercedes any mandatory budgetary provisions, *id.* §1001 (4), and consequently federal courts clearly continue to have jurisdiction to enforce such ministerial actions.

Senator Ervin pointed out the import of the Act on impoundment litigation on the day of Senate passage:

> The Comptroller General will be granted authority to sue in the Federal [*sic*] District Court for the District of Columbia to enforce the provisions of the title . . . . This authority is not intended to infringe upon the right of any other party to initiate litigation . . . .
>
> A disclaimer section directs that nothing in the impoundment title should be construed as ratifying or approving any past or present impoundment, affecting the claims or defenses of any party to litigation concerning any impoundment, or asserting or conceding the constitutional powers or limitations of either the Congress or the President. The disclaimer also disavows any intention by Congress to supercede any law which requires the mandatory obligation of budget authority, since several such statutes have been enacted in response to the wholesale impoundment of funds appropriated for specific programs.

120 CONG. REC. S11222 (daily ed. June 21, 1974).

only if there was no "feasible and prudent alternative." 401 U.S. at 411. The standards in the Water Pollution Control Act allotment provision are far more explicit regarding allotment than the statute in the *Overton* case. The mandatory nature of the Water Pollution Control Act needs no further description here. The duty of the Administrator in allotment was clearly ministerial. The overall logic, specific language, and legislative history of the Act admits of no other interpretation than that allotment is a mandatory duty.

The Administrator alleges that the allotment phase of the Water Pollution Control Act "does not announce any specific precepts that are to guide the President in determining allottments [*sic*]." Brief for Petitioner at 43. However, in fact, the Act announces a very specific standard -- mandatory allotment. There are no detailed standards since allotment is ministerial. Detailed standards regarding approval appear at the obligation phase since that is where discretion is exercised and explicit standards are necessary.

The Water Pollution Control Act contains an explicit directive to allot. There is no latitude for what Petitioner describes as questions of judgement requiring close analysis and delicate choices. Brief for Petitioner at 42-43. Allotment is not an act committed to agency discretion. Consequently, the APA presents no bar to reviewability.

CONCLUSION

The Administrator failed to comply with a statutory requirement of the Water Pollution Control Act by failing to allot six billion dollars authorized by Congress. Plain meaning, legislative history and the overall structure of the Act demonstrate the allotment of full sums is mandatory. Moreover, the issue before the Court is justiciable and not barred by the doctrines of sovereign immunity or political question.

For the reasons stated herein, the Center for Governmental Responsibility urges this Court to affirm the judgement of the Court of Appeals for the District of Columbia and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

METHOD OF EXPENDITURE IN THE WATER POLLUTION CONTROL ACT